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The Overlooked Role of the National Environmental Policy Act in Protecting the Western Environment: NEPA in the Ninth Circuit

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THE OVERLOOKED ROLE OF THE NATIONAL ENVIRONMENTAL POLICY ACT IN PROTECTING THE WESTERN ENVIRONMENT: NEPA IN THE NINTH CIRCUIT

Michael C. Blumm* & Keith Mosman**

Abstract: Critics widely disparage the National Environmental Policy Act (NEPA) for being a mere “paper tiger” or bureaucratic red-tape. The U.S. Supreme Court has surely encouraged this perception by treating the statute with consistent hostility, reducing it to a requirement only to follow prescribed administrative procedures but not produce any environmental results. But in the Ninth Circuit, NEPA lives a more important life, since that court has not forgotten NEPA’s essential environmental purpose. This article examines four lines of cases in the Ninth Circuit that may show that NEPA’s future might reflect its conservation purpose. These cases 1) deny NEPA plaintiffs with purely economic motives standing, 2) exempt from NEPA analysis designations of critical habitat under the Endangered Species Act because they have no physical effect on the environment, 3) reduce the threshold for when NEPA requires preparation of an environmental impact statement (EIS) by requiring environmental plaintiffs to raise only “substantial questions” about whether the agency proposal may produce significant environmental effects, and 4) accept a relaxed scope of alternatives in EISs on agency proposals that have a conservation purpose. We maintain that if other circuits adopted these four Ninth Circuit rules, NEPA would achieve the environmental protection that Congress envisioned from the statute four decades ago.

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I. INTRODUCTION

The National Environmental Policy Act (NEPA),¹ the so-called Magna Carta of the environment,² suffers from a

1. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006).

2. J. Matthew Haws, Note, *Analysis Paralysis: Rethinking the Court’s Role in Evaluating EIS Reasonable Alternatives*, 2012 U. ILL. L. REV. 537, 540 (2012) (“Since President Richard Nixon signed NEPA into law on January 1, 1970, the Act has been described as the ‘Magna Carta’ of environmental legislation.”); Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J.L. & POL’Y 293, 293 (2010) (“[NEPA], the Magna Carta of environmental law, requires all federal agencies to evaluate the environmental impacts of their actions[.]”); Jean M. Emery, Comment, *Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat Under the Endangered Species Act?*, 28 ARIZ. ST. L.J. 973, 973–74 (1996) (“Hailed by some as the Magna Carta of environmental legislation, [NEPA] entered the American scene unheralded and uncontested. President Nixon and the 91st Congress viewed the bill as an innocuous, vague statement of idealistic vision, passing it with little debate. Yet, this ‘paper tiger’ turned out to have some very long teeth.”); Sam Kalen, *The APA’s Influence on the Development of the National Environmental Policy Act*, NAT. RES. & ENV., Spring 2009, at 3 (“When Congress passed NEPA it became touted as the Magna

declining reputation. Students are always disappointed to learn that the Supreme Court has repeatedly ruled that NEPA does not equip courts to reverse agency decisions that injure the environment.³ One student succinctly summed up the disappointment in a comment to Professor Oliver Houck on an Environmental Law exam: “NEPA: you can kill all the deer, so

Carta of environmental laws, yet by 1980 the Act had become a process-oriented statute rather than a substantive policy governing federal agency decisions.”); Jenna Musselman, Comment, *Safetea-Lu’s Environmental Streamlining: Missing Opportunities for Meaningful Reform*, 33 *ECOL. L.Q.* 825, 856 (2006) (“As the ‘Magna Carta’ of U.S. environmental law, NEPA was supposed to provide an environmental charter that would integrate environmental values into all levels of federal agencies and make the environment a key concern in all federal decision-making.”).

3. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978) (“[The purpose of NEPA] is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decision making unit of the agency.”); see also James Allen, *NEPA Alternatives Analysis: The Evolving Exclusion of Remote and Speculative Alternatives*, 25 *J. LAND, RES., & ENVTL. L.* 287, 298 (2005) (“The concept of a remote and speculative alternative has become a mainstay of NEPA alternatives litigation, and Vermont Yankee is regularly cited for the proposition that such alternatives need not be considered in a NEPA analysis.”); *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980) (“[O]nce an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’” (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976))); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”). Note that in the first few years of NEPA litigation, the D.C. Circuit thought that consideration of an agency’s NEPA decision for procedural compliance was a substantive review, albeit one limited to the adequacy of the agency’s of the breadth of environmental considerations. See *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (“[I]f the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.”); *Duke City Lumber Co. v. Butz*, 382 F. Supp. 362, 374–75 (D.D.C. 1974), *opinion adopted in part*, 539 F.2d 220 (D.C. Cir. 1976) (“In its review of the agency’s decision, the Court is obligated to consider the substantive decision on the merits to see if it is in accord with NEPA’s requirements... The Court’s review, however, is a limited one for the purpose of determining whether the agency reached its decision after full, good faith consideration of the environmental factors.”); *Atchison, T. & S. F. Ry. Co. v. Callaway*, 459 F. Supp. 188, 193–94 (D.D.C. 1978) (“Most courts that have considered the issue have held that agency decisions to take action on projects having a significant environmental impact may be reviewed substantively by the courts to ensure that the decision was not arbitrary and capricious.”). The D.C. Circuit’s language may have implied that NEPA was both a substantive and a procedural law, but the Supreme Court held that judicial review under NEPA is procedural in *Vermont Yankee*: “NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.” 435 U.S. at 558.

long as you write it down.”⁴

Defenders of NEPA nevertheless maintain that by requiring federal agencies to anticipate the adverse effects of their proposals in advance,⁵ NEPA authorizes the public and other agencies to participate in decision making, often uncovers other statutory violations, and opens up courthouse doors for challenges to government actions. The latter result, some NEPA defenders have pointed out, has created a kind of common law of the environment,⁶ since the factual context for NEPA cases continuously changes, enabling courts to either engage in “soft glance” or “hard look” review of whether agency

4. See E-mail from Oliver A. Houck, Professor of Law, Tulane University Law School, to Envlawprofessors (Dec. 19, 2011, 20:15 CDT) (*on file with author*), referring to the Supreme Court’s decision in *Methow Valley Citizens Council*, 490 U.S. at 350–51 (stating that the Forest Service could permit construction of a ski facility at Sandy Butte, even if it would result in a total loss of the local mule deer herd, and still be in compliance with NEPA).

5. As Robert Dreher has noted, “NEPA gives effect to the common-sense axiom ‘look before you leap.’ The Act does not require federal agencies to choose an environmentally-friendly course over a less environmentally-friendly option. But, as a practical matter, the requirement to prepare an EIS ensures that agency decisions will reflect environmental values.” ROBERT G. DREHER, NEPA UNDER SIEGE: THE POLITICAL ASSAULT ON THE NATIONAL ENVIRONMENTAL POLICY ACT 3 (2005), available at <http://www.arcticgas.gov/sites/default/files/documents/2005-nepaundersiege.pdf>.

6. Justice Marshall noted that “[NEPA] seems designed to serve as no more than a catalyst for development of a ‘common law’ of NEPA. To date, the courts have responded in just that manner and have created such a ‘common law.’ Indeed, that development is the source of NEPA’s success.” *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., concurring in part and dissenting in part) (internal citation omitted); See also Jeannette MacMillan, *An International Dispute Reveals Weaknesses in Domestic Environmental Law: NAFTA, NEPA, and the Case of Mexican Trucks (Department of Transportation v. Public Citizen)*, 32 *ECOL. L.Q.* 491, 522 (2005) (“Even NEPA’s procedural instructions leave many holes . . . Courts have taken this opportunity to create an extensive ‘common law’ of NEPA.”); Peter S. Knapman, Comment, *A Suggested Framework for Judicial Review of Challenges to the Adequacy of an Environmental Impact Statement Prepared Under the Hawaii Environmental Policy Act*, 18 *U. HAW. L. REV.* 719, 725 (1996) (“Since NEPA was enacted there have been a large number of cases litigated under the statute. This has created a significant body of NEPA ‘common law,’ which is an important addition to the text of the statute and accompanying regulations.”); Celia Campbell-Mohn & John S. Applegate, *Learning from NEPA: Guidelines for Responsible Risk Legislation*, 23 *HARV. ENVTL. L. REV.* 93, 125 (1999) (“NEPA and its common law can serve as instructive models for federal risk legislation.”); David M. Shea, Note, *The Project Bioshield Prisoner’s Dilemma: An Impetus for the Modernization of Programmatic Environmental Impact Statements*, 33 *B.C. ENVTL. AFF. L. REV.* 695, 735 (2006) (“[W]hile there currently exists a vast body of NEPA common law, the U.S. Supreme Court has attempted to reduce the burdens of environmental litigation by broadcasting its preference that CEQ’s regulations be given substantial deference.”).

proposals complied with NEPA procedures.⁷ The results can give NEPA decisions an aura of unpredictability, perhaps suggesting that the results of the case law are more a consequence of the underlying merits of the agency proposal, the nature of the opposition, or the subjective views of the reviewing court.

Without quarreling with the notion that NEPA cases are highly fact-specific, the fact that there is NEPA law protective of the environment is often overlooked. In fact, the Ninth Circuit has created a considerable amount of NEPA case law that achieves the overarching statutory goal of ensuring that federal actions produce “conditions under which man and nature can exist in productive harmony.”⁸ The court has proved unwilling to allow economic, profit-seeking interests to file NEPA suits⁹ or use NEPA to delay critical habitat designations under the Endangered Species Act (ESA).¹⁰ Similarly, a plaintiff need only show that “substantial questions” about the effect of the action exist when claiming that a proposed action is “significant,” and therefore requires preparation of an Environmental Impact Statement (EIS).¹¹ In

7. For examples of so-called “soft glance” review, affirming the agency proposal, *see* *W. Org. of Res. Councils v. Bureau of Land Mgmt.*, 591 F. Supp. 2d 1206, 1240 (D. Wyo. 2008), *aff’d sub nom.*, *BioDiversity Conservation Alliance v. Bureau of Land Mgmt.*, 608 F.3d 709 (10th Cir. 2010) (in a challenge to the BLM’s approval of project to develop thousands of coalbed methane wells in Wyoming and Montana, the district court stated that “the voluminous administrative record in this case, which includes twenty compact disks of information, belies the assertion that the BLM did not take a hard look at the potential environmental consequences of the proposed project.”); *Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994) (an EIS prepared prior to the Federal Highway Administration’s decision to approve a toll road that analyzed “all the alternatives that were feasible and briefly discusse[d] the reasons others were eliminated” was sufficient to comply with NEPA). “Hard look” review cases include *Nat’l Audubon Soc’y v. Dep’t of Navy*, 422 F.3d 174, 187 (4th Cir. 2005) (Navy’s EIS in support of decision to build aircraft landing training field near a national wildlife refuge had “deficiencies in each area of the Navy’s analysis would not, on their own, be sufficient to invalidate the EIS. But a review of the various components of the EIS taken together indicate[d] that the Navy did not conduct the ‘hard look’ that NEPA requires.”), and *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1378 (9th Cir. 1998) (concluding that cumulative impact analysis contained in EIS on decision to approve timber sales in national forest was inadequate).

8. 42 U.S.C. § 4331(a) (2006).

9. *See infra* notes 19–78 and accompanying text.

10. *See infra* notes 79–115 and accompanying text.

11. *See infra* notes 116–52 and accompanying text.

addition, the appropriate range of alternatives an EIS must consider, the heart of an EIS,¹² is less expansive concerning agency proposals protecting the environment than those harming the environment.¹³

These Ninth Circuit interpretations have together created a body of NEPA law that favors positive environmental outcomes. None of them transgresses the Supreme Court's proscription against courts reversing agency decisions on their substantive environmental merits.¹⁴ But collectively they make it difficult for those whose interest is in private profit, not ecological protection, to use NEPA for their economic purposes. The decisions also facilitate government actions protecting the environment. If other circuits widely adopted these Ninth Circuit rules, NEPA's reputation as a paper tiger, imposing only red tape on government action,¹⁵ would diminish.

Arguably, NEPA's language in section 101, which is routinely ignored by the courts, aims to ensure that federal actions foster environmental quality.¹⁶ Section 102(1) of the statute, also largely overlooked by the courts, reinforces this notion by calling for agencies to pursue actions consistent with NEPA's environmental policies.¹⁷ But until these provisions

12. 40 C.F.R. § 1502.14 (2012).

13. See *infra* notes 153–92 and accompanying text.

14. See, e.g., cases cited *supra* note 3.

15. See Jason J. Czarnecki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 STAN. ENVTL. L.J. 3, 12 (2006) (“[The Supreme Court] must provide some mechanism for NEPA to be more than a ‘paper tiger.’”); William Murray Tabb, *The Role of Controversy in NEPA: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 175, 190 (1997) (asking “[h]as NEPA become a ‘paper tiger’ after all?” and recommending a “comprehensive, multi-factored approach” to determining whether an action is “highly controversial”); see also *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (stating that the inclusion of the phrase “to the fullest extent possible” in section 102 of NEPA “does not make NEPA’s procedural requirements somehow ‘discretionary.’ Congress did not intend the Act to be such a paper tiger”).

16. “[I]t is the continuing responsibility of the Federal Government to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” 42 U.S.C. § 4331(b)(3) (2006).

17. “The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and

are judicially exhumed from the statutory grave, decisions like those discussed in this article offer the best opportunity for the Magna Charta of the U.S. environment to achieve its protective goals.

This article discusses four prominent Ninth Circuit rules of NEPA interpretation that foster federal government action to protect the environment. Section I explains the court's decisions concerning the prudential rule that only those plaintiffs within "the zone of interests" of the statute have standing to invoke court review. Section II explores the requirement that agency actions triggering NEPA's requirements must have a physical effect on the environment, not merely work a legal change protecting the environment, like designating critical habitat under the ESA. Section III discusses the burden-shifting effect that occurs when a plaintiff challenges an agency's determination that a proposed action is not "significant" by showing that "substantial questions" about the effect of the proposal exist. When the court determines that such questions are present, the agency must then demonstrate that the questions raised are not "substantial," or it must prepare an EIS. Section IV focuses on NEPA's key requirement to analyze alternatives, which in the Ninth Circuit may be less expansive in the case of government actions that foster environmental protection than those that undermine it. We conclude by suggesting that these four Ninth Circuit rules have helped NEPA protect the Western environment, and if they were embraced by other circuits, would restore some of NEPA's promise as articulated by a prescient Congress over forty years ago.¹⁸

II. STANDING UNDER NEPA'S "ZONE OF INTERESTS": EXCLUDING PECUNIARY INTERESTS

According to Professor Doremus, standing to file suit "remains the most persistent constitutional quandary of

administered in accordance with the policies set forth in this chapter." 42 U.S.C. § 4332 (2006).

18. *See, e.g.*, 115 CONG. REC. 40,924 (daily ed. Dec. 22, 1969) (statement of Rep. Dingell) ("[T]he passage of this legislation will constitute one of the most significant steps ever taken in the field of conservation . . . it will offer us an opportunity to carry out the policies and goals set forth in the bill to provide each citizen of this great country a healthful environment.").

environmental law.”¹⁹ Since the Supreme Court’s decision in *Sierra Club v. Morton*,²⁰ a long line of Supreme Court cases—many involving issues affecting the environment—have established a three-pronged test for constitutional standing.²¹ Additionally, courts have imposed a series of “prudential” standing requirements.²² The contours of prudential standing may remain imprecise,²³ but plaintiffs alleging statutory violations must show that they are “arguably within the zone of interests” the statute

19. Holly Doremus, *The Persistent Problem of Standing in Environmental Law*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10,956 (2010).

20. 405 U.S. 727, 737–39 (1972) (refusing to grant the Sierra Club standing to challenge approval of the Disney Corporation’s plan to develop a ski resort on Mineral King mountain, but allowing the club to amend its complaint to show that its members used the Mineral King environment and would suffer aesthetic injuries if that environment were degraded, thereby creating user-based standing for the organization that would satisfy the constitutional requirement of a concrete “controversy”).

21. The three elements required to establish constitutional standing are (1) that the party has suffered an “injury in fact,” which is “an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;” (2) that the injury is “fairly traceable” to actions of the defendant; and (3) that the injury is likely to “redressed by a favorable decision.” *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *see also* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (“Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact. . . . Second, there must be a causal connection between the injury and the conduct complained of. . . . Third . . . that the injury will be ‘redressed by a favorable decision.’” (internal citations omitted)); *Maine People’s Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006) (“Those requirements are expressed in a familiar three-part algorithm: a would-be plaintiff must demonstrate a concrete and particularized injury in fact, a causal connection that permits tracing the claimed injury to the defendant’s actions, and a likelihood that prevailing in the action will afford some redress for the injury.”).

22. Concerning prudential standing, a court asks “whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.” *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Included among the requirements for prudential standing are that: (1) “when the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction;” (2) “the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties;” and (3) that “a plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.” *Id.* at 499. *Bennett*, 520 U.S. at 162 (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982)).

23. Doremus, *supra* note 19, at 10,957 (noting that the lack of precision in the doctrine is largely due to a “closely, but deeply, divided” Supreme Court, which has issued “a progression of 5-4 decisions that do not make a coherent whole”).

recognized.²⁴

In the case of NEPA, the Ninth Circuit has interpreted this prudential standing test to exclude plaintiffs whose interest in invoking the statute is pecuniary and unconnected to any legitimate environmental concerns, as claims by such plaintiffs are inconsistent with NEPA's environmental purpose.²⁵ By its own terms, NEPA announced a national policy to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation."²⁶ In addition to considering a challenge to a plaintiff's prudential standing, courts often address the purpose of NEPA.²⁷ The Council on Environmental Quality's regulations implementing the statute clarify that "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."²⁸ As the CEQ

24. See *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (first articulating the "zone of interests" test for statutory standing, interpreting the Administrative Procedure Act to grant standing to those "aggrieved by agency action within the meaning of a relevant statute").

25. See *Port of Astoria v. Hodel*, 595 F.2d 467, 473–74 (9th Cir. 1979) (discussed at *infra* notes 35–46 and accompanying text). Unlike constitutional standing, Congress can limit or eliminate prudential standing. See *Bennett*, 520 U.S. at 162 ("unlike their constitutional counterparts, [prudential standing requirements] can be modified or abrogated by Congress"). Examples of statutes that abrogate prudential standing include the Resource Conservation and Recovery Act, which states that "any person may commence a civil action on his own behalf against any person... who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter" 42 U.S.C. § 6972(a) (2006); and the Comprehensive Environmental Response, Compensation, and Liability Act, which contains highly similar language at 42 U.S.C. § 9659. Courts have confirmed that "Congress has abrogated the prudential standing requirements under these statutes," see, e.g., *DMJ Associates, L.L.C. v. Capasso*, 288 F. Supp. 2d 262, 267 (E.D.N.Y. 2003).

26. 42 U.S.C. § 4321 (2006). NEPA also established a Council on Environmental Quality that promulgated regulations implementing NEPA procedures in 1978. See 40 C.F.R. § 1500 (2012).

27. See, e.g., *Mun. of Anchorage v. United States*, 980 F.2d 1320, 1329 (9th Cir. 1992) ("The purpose of NEPA is to ensure that federal agencies consider the environmental impact of their actions."); *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 812 (9th Cir. 2005) ("We hold that here the [inaccurate economic information relied upon by the Forest Service] was sufficiently significant that it subverted NEPA's purpose of providing decision makers and the public with an accurate assessment of the information relevant to evaluate the Tongass Plan.").

28. 40 C.F.R. § 1500.1(c) (2012) ("The NEPA process is intended to help public

regulations illustrate, NEPA's purpose of environmental protection is advanced through the statute's procedures, which require thorough analysis of environmental consequences.²⁹ The Supreme Court has similarly stated that protection of the physical environment is NEPA's purpose.³⁰

The Ninth Circuit has sometimes characterized NEPA's purpose as simply informational,³¹ explaining that NEPA's purpose requires action agencies to develop and publicly disclose information about the environmental consequences of their proposals in order to prevent unforeseen environmentally destructive results.³² However, the court also recognizes the

officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.”).

29. *Id.* (“The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”).

30. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983) (“[A]lthough NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment”) (discussed *infra* notes 102–4 and accompanying text).

31. *See Columbia Basin Land Prot. Ass’n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981) (ruling that an EIS on a Memo of Understanding between the Bureau of Land Management and the Bureau of Reclamation, in addition to the EIS prepared on the relevant action of constructing transmission lines, was not required); “The purpose of NEPA is to assure that federal agencies are fully aware of the present and future environmental impact of their decisions. Additionally, the preparation of an EIS ensures that other officials, Congress, and the public can evaluate the environmental consequences independently.” *Id.* (citing *Lathan v. Brinegar*, 506 F.2d 677 (9th Cir. 1974) (en banc) (determining that NEPA applies to state projects that received federal grants after NEPA's passage and that NEPA documents must be made available to the public prior to hearings)); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) (concluding that substantial questions about the effects of paving a road in a national forest required preparation of an EIS) (“An assessment must be ‘prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made.’” (quoting 40 C.F.R. § 1502.5 (1987))).

32. *Friends of the Clearwater v. Dombek*, 222 F.3d 552, 557 (9th Cir. 2000) (deciding that the Forest Service's decision not to prepare a supplemental EIS on timber sales in Nez Perce National Forest violated NEPA) (“NEPA's purpose is to ensure that ‘the agency will not act on incomplete information, only to regret its decision after it is too late to correct.’” (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) (holding that the Army Corps of Engineers' decision not to prepare a supplemental EIS on the Elk Creek Dam in Oregon's Rogue River Basin after being presented with new information was not arbitrary and capricious)); *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1086 (9th Cir. 2004) (concluding that the Navy was not required to complete NEPA analysis for submarine base missile deployment decisions) (“NEPA's purpose is to ensure that federal agencies take a ‘hard look’ at environmental consequences before committing to

broadier purpose of NEPA to protect the environment³³ and generally approaches the Act with this purpose in mind.

Consequently, those who seek to protect the environment for their own use and enjoyment are clearly within the zone of interests that NEPA aimed to protect, and therefore they may invoke its procedures in court.³⁴ But those who seek to enforce NEPA purely for profit fall outside the statute's zone of interests under a longstanding Ninth Circuit rule.³⁵

A. *Excluding Purely Pecuniary Interests from NEPA's Zone of Interest*

The Ninth Circuit's prudential standing interpretation is quite venerable, originating in the 1979 decision of *Port of Astoria v. Hodel*, where the Port, along with a broadcasting company, a citizens group, and five individuals all challenged a proposed power sale contract between the federal Bonneville

action." (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)); *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005) ("The purpose of NEPA is to require disclosure of relevant environmental considerations that were given a 'hard look' by the agency, and thereby to permit informed public comment on proposed action and any choices or alternatives that might be pursued with less environmental harm."); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011) ("NEPA aims (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public.").

33. See, e.g., *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 945 (9th Cir. 2005) ("[T]he overarching purpose of [NEPA is] environmental protection.") (discussed further *infra* notes 63–73 and accompanying text); *Ctr. for Biological Diversity v. Nat'l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (ruling that agency's decision not to prepare an EIS on the corporate average fuel economy standards for light trucks was "markedly deficient," and remanding to the agency for preparation of revised analysis) ("NEPA 'is our basic national charter for protection of the environment.'" (quoting 40 C.F.R. § 1500.1(a) (2006))); *Pac. Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981) ("The legislative history also indicates the purpose of NEPA was to provide a mechanism to enhance or improve the environment and prevent further irreparable damage.") (discussed further *infra* notes 85–89 and accompanying text).

34. See, e.g., *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) ("The birdwatchers' interest in preserving the historic buildings and natural environment of the Naval Station and preventing adverse environmental effects from its proposed reuse falls squarely within the zone of interests protected by NEPA."); *City of Las Vegas, Nev. v. Fed. Aviation Admin.*, 570 F.3d 1109, 1114 (9th Cir. 2009) ("[T]he city alleges a concrete injury to its interests in the environment and in safety which falls within the zone of interests of NEPA.").

35. See *infra* notes 36–78 and accompanying text.

Power Administration (BPA) and an aluminum plant.³⁶ The original proposal would have located the plant near Astoria, along the Columbia River near the Oregon coast, but BPA changed the location to a site nearly three hundred miles upriver in Umatilla County, Oregon.³⁷ Disappointed at this relocation, the Port and the others filed suit, claiming that BPA violated NEPA by failing to prepare an environmental impact statement on the contract, the plant itself, and associated facilities.³⁸

The district court agreed that the contract required an EIS but refused to invalidate it, ruling instead that the contract was unenforceable without an EIS.³⁹ The lower court also concluded that the Port lacked standing to challenge BPA's proposal under NEPA because the Port's sole concern was its economic injury,⁴⁰ although the court upheld the standing of the other plaintiffs.⁴¹ All of the plaintiffs appealed, seeking invalidation of the contract. The Port also challenged the lower court's ruling denying its standing.⁴²

The Ninth Circuit affirmed on the standing issue, deciding

36. 595 F.2d 467, 473 (9th Cir. 1979).

37. *See id.*

38. The proposal included not only supplying BPA electricity to the plant, but also the construction of federal transmission lines. *Id.* Moreover, the power sale contract actually began the implementation of BPA's Hydro-Thermal Power Program, under which BPA promised to help finance some twenty-six new thermal (coal and nuclear) power plants through power sale contracts like this one. *See id.* at 477–78. The connection of the power contract to this program would prove to be its undoing, as the plant was never constructed. *See infra* note 47.

39. *Port of Astoria v. Hodel*, [1975] 5 *Env'tl. L. Rep.* (Env'tl. Law Inst.) 20,657 (D. Or. Aug. 26, 1975).

40. *Id.* at 20,658. ("Economic and environmental interests must be linked under the NEPA zone of interest. I find the Port, despite allegations to the contrary, is solely concerned with its pecuniary interest.")

41. *Id.* The court concluded that members of the citizen's group and the individuals had standing because they "live, work, and/or spend leisure time in Umatilla County." The broadcast company had standing because the action threatened to interfere with its signal and injure its "corporate health." The court's distinction between the broadcast company's standing and the Port's lack of standing seemed premised on the fact that the former's existing business would be adversely affected by the environmental effects of the aluminum plant, while the latter's potential business expectations were frustrated by the lack of environmental effects, as the plant avoided its neighborhood.

42. *Id.* The district court stated that "the Port, despite allegations to the contrary, is solely concerned with its pecuniary interest . . . The Port of Astoria lacks standing to bring this action."

that the Port's alleged economic losses due to the relocation of the plant were insufficient to support NEPA standing. The court observed that "these alleged injuries represent only pecuniary losses and frustrated financial expectations that are not coupled with environmental considerations Consequently, the alleged injuries are outside of NEPA's zone of interest and are not sufficient to establish standing."⁴³ The court drew support for its position from decisions in the District of Columbia, Fourth, and Eighth Circuits.⁴⁴

The Ninth Circuit upheld the standing of the other plaintiffs, including the broadcasting company whose alleged injuries concerned potential damage to its broadcast signal from the power lines required by the plant.⁴⁵ The court acknowledged that the broadcaster's injury "may be classified as economic." However, the court determined that the alleged injury resulted directly from the environmental effects of building the plant and therefore was "an act that lies within NEPA's embrace."⁴⁶ The court then considered the merits of the case and affirmed the district court's decision that the contract was unenforceable prior to BPA's preparation of an EIS on the construction of the plant.⁴⁷

43. *Port of Astoria*, 595 F.2d at 475.

44. *Id.* (citing *Realty Income Trust v. Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977) (upholding standing of property owner challenging new federal building construction that would house federal offices currently in property holder's buildings, but recognizing that "an allegation of injury to monetary interest alone may not bring a party within the zone of environmental interests as contemplated by NEPA for the purposes of standing"); *Clinton Cmty. Hosp. Corp. v. Southern Md. Med. Ctr.*, 374 F. Supp. 450 (D. Md. 1974), *aff'd*, 510 F.2d 1037 (4th Cir. 1975), *cert. denied*, 422 U.S. 1048 (1975) (denying standing to hospital operators challenging construction of competing hospital); *Robinson v. Knebel*, 550 F.2d 422, 424–25 (8th Cir. 1977) (granting standing to property owners whose property was to be condemned for a development because "their environmental concerns are not so insignificant that they ought to be disregarded altogether.")). The Port also argued that it should have NEPA standing because it had pollution control authority under the state's statute defining the authority of ports over harbors (OR. REV. STAT. § 777.120(2)), citing NEPA's language of involving local agencies in its processes. *Port of Astoria*, at 475 (citing 42 U.S.C. § 4332(2)(C) (1969)). But the court rejected this argument, noting that the Port's minor environmental protection role was entirely discretionary. *Id.* at 475–76.

45. *Port of Astoria*, 595 F.2d at 476. The citizens group and the individual plaintiffs living in the vicinity of the proposed plant successfully argued that they would suffer "ecological and aesthetic injuries" from the physical presence of the plant. *Id.*

46. *Id.* ("[T]he injury is the immediate and direct result of the building of the Alumax plant, an action that 'will have a primary impact on the natural environment.'").

47. *Id.* at 479–80. In related litigation, environmentalists successfully argued that

B. The Influence of Port of Astoria in the Ninth Circuit

The *Port of Astoria* rule—denying NEPA standing to those with only pecuniary interests unconnected to legitimate environmental concerns—has been Ninth Circuit law for over thirty years. The rule has been applied in a number of ensuing cases. For example, in *Nevada Land Action Ass'n v. U.S. Forest Service*, the court held that an organization of ranchers with permits to graze on federal lands lacked standing to challenge the Forest Service's Land and Resource Management Plan for the Toiyabe National Forest.⁴⁸ The Ninth Circuit noted that the organization “cannot invoke NEPA to prevent ‘lifestyle loss’ when the lifestyle in question is damaging to the environment.”⁴⁹ A similar outcome occurred when an electric utility challenged an EIS prepared by the Forest Service for the approval of an oil pipeline likely to interfere with the utility's electricity transmission in *City of Los Angeles v. U.S. Department of Agriculture*.⁵⁰ The Central District of California ruled that the utility lacked standing because its primarily economic claims conflicted with the public interest in the environment, and therefore were likely to frustrate the purposes of NEPA.⁵¹

In *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture*, a group of cattle producers challenged a rule that allowed

the program of which the proposed aluminum plant power-supply contract was a part also required an EIS. See *Natural Res. Def. Council v. Hodel*, 435 F. Supp. 590 (D. Or. 1977), *aff'd*, 626 F.2d 134 (9th Cir. 1980) (requiring that BPA prepare an EIS on its Hydro-Thermal Power Program, which envisioned twenty-six new coal and nuclear plants); BPA thus could not implement the power contract for the proposed aluminum plant without completing this program EIS. It took BPA several years to complete the EIS, and by the time the agency did, the proponents of the plant scrapped it, and the plant was never built. See generally Michael C. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Power Planning and Conservation Act*, 58 WASH. L. REV. 175, 226–27 (1983). The litigation was ultimately held to be moot, following adoption of the Pacific Northwest Electric Power Planning and Conservation Act (codified at 16 U.S.C. §§ 839–839h). *Natural Res. Def. Council v. Munro*, 520 F. Supp. 17 (D. Or. 1981).

48. 8 F.3d 713 (9th Cir. 1993).

49. *Id.* at 716.

50. 950 F. Supp. 1005 (C.D. Cal. 1996).

51. *Id.* at 1012–14. The court explained that NEPA advances “a general public interest in the environment,” and that the utility's “economic interests are of such magnitude as to render” the claims in conflict with NEPA. *Id.* at 1013.

resumption of Canadian beef imports under NEPA.⁵² The Ninth Circuit noted that the cattle producers had alleged only economic harms and a vague concern for human health and Bovine Spongiform Encephalopathy, or “mad cow disease” contamination.⁵³ The court concluded that concerns about food-borne illnesses were outside the scope of NEPA,⁵⁴ and consequently the cattlemen lacked standing under NEPA because they had “no claimed or apparent environmental interest,” and were therefore outside NEPA’s zone of interest.⁵⁵

These decisions, among others,⁵⁶ retained the rationale of *Port of Astoria*. The Ninth Circuit viewed NEPA as a means to advance environmental protection, not economic interests.⁵⁷ This view remained unchallenged until the Eighth Circuit took a contrary position in 1999.⁵⁸

52. 415 F.3d 1078 (9th Cir. 2005).

53. *Id.* at 1103 (“R-CALF points to only one paragraph in its complaint to justify its standing under NEPA. Every allegation in this paragraph, however, concerns the economic interest of R-CALF members except the following: ‘R-CALF USA members will also be adversely affected by the increased risk of disease they face when Canadian beef enters the U.S. meat supply.’”).

54. *Id.* (“R-CALF’s claimed interest, however, has no connection to the physical environment; rather, it is solely a matter of human health.”).

55. *Id.* at 1103–04 (citing *Town of Stratford, Conn. v. Fed. Aviation Admin.*, 285 F.3d 84, 88 (D.C. Cir. 2002)).

56. Other Ninth Circuit decisions following the *Port of Astoria* rule include *W. Radio Services Co. v. Espy*, 79 F.3d 896 (9th Cir. 1996) (telecommunications company lacked standing to challenge Forest Service’s decision to issue a special-use permit for a competitor to relocate their radio tower facility in the Ochoco National Forest under NEPA. The court noting that the plaintiffs admitted that their “sole complaint was alleged interference, which we have held is purely economic” *Id.* at 903); *Arizona Cattle Growers’ Ass’n v. Cartwright*, 29 F. Supp. 2d 1100, 1109 (D. Ariz. 1998) (ranchers challenging adoption of regional grazing management standards by the Forest Service “must allege an environmental injury to have standing under NEPA.” denied standing under NEPA); *Kingman Reef Atoll Investments, L.L.C. v. U.S. Dep’t of Interior*, 195 F. Supp. 2d 1178 (D. Haw. 2002) (denying standing to plaintiffs claiming ownership of a reef over which the Department of Interior had established a National Wildlife Refuge because “[t]here is no evidence that Plaintiffs have any environmental or conservation interest in Kingman Reef, or that preserving the environment is part of their mission.” *Id.* at 1185–86).

57. “The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions.” *Nev. Land Action Ass’n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing *Portland Audubon Soc’y v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989) (abrogated on other grounds, *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)).

58. *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999).

C. *Reaffirming the Port of Astoria Rule After its Rejection by the Eighth Circuit*

The Ninth Circuit adhered to the reasoning of *Port of Astoria* despite *Friends of Boundary Waters Wilderness v. Dombeck*,⁵⁹ a contrary 1999 decision of the Eighth Circuit. In *Friends of Boundary Waters Wilderness*, the Eighth Circuit held that in light of the Supreme Court's decision in *Bennett v. Spear*,⁶⁰ NEPA's zone of interests included economic interests, at least where the challenge concerned the economic analysis of an EIS.⁶¹ The Eighth Circuit granted standing to a group of plaintiffs consisting of counties, outfitters, and concerned citizens who filed the challenge because the EIS in question included analysis of the economic implications of the considered alternatives.⁶² In *Ashley Creek Phosphate Co. v. Norton*, the Ninth Circuit reaffirmed its rule that purely economic interests may not use NEPA to challenge federal proposals, expressly rejecting the Eighth Circuit's ruling in *Friends of Boundary Waters Wilderness*.⁶³

In *Ashley Creek*, a private landowner challenged a Bureau of Land Management EIS on a federal permit to Agrium Conda Phosphate Operations, a phosphate miner and fertilizer manufacturer whose mine was near the habitat of Canada lynx, an ESA-listed species.⁶⁴ The landowner maintained that the EIS failed to consider the alternative of purchasing the fertilizer from the landowner's private lands containing phosphate deposits.⁶⁵ The fertilizer manufacturer had

59. *Id.*

60. 520 U.S. 154 (1997) (granting standing to irrigators challenging a biological opinion under the Endangered Species Act).

61. The court reasoned that the plaintiffs were within NEPA's zone of interest because one of the "explicit policies of NEPA" is to "fulfill the *social, economic*, and other requirements of present and future generations of Americans," and the plaintiffs' challenge to the validity of the data relied upon by the agency furthered that policy. *Friends of Boundary Waters Wilderness*, 164 F.3d at 1126 (quoting 42 U.S.C. § 4331(a) (1969)).

62. *Id.*

63. 420 F.3d 934, 942 (9th Cir. 2005).

64. *See id.* at 936.

65. *See id.* ("Ashley Creek submitted a letter commenting that the draft EIS was deficient because it did not consider as an alternative the possibility of mining the Vernal deposits that Ashley Creek controls. Ashley Creek wrote that the Vernal deposits were not only cost-effective, but were also environmentally superior to the proposed action.").

previously rejected this alternative as cost-prohibitive because the site was not prepared for mining operations.⁶⁶ The district court dismissed the landowner's NEPA claim because the alleged injury was purely economic, and thus outside the statute's zone of interests.⁶⁷

The landowner appealed, and the Ninth Circuit affirmed on both constitutional and prudential standing grounds.⁶⁸ Concerning the latter, the landowner argued that the Ninth Circuit should adopt the Eighth Circuit's approach, allowing purely economic challenges to an EIS because of the requirement that an EIS consider "long-term productivity" encompassed pecuniary interests within NEPA's zone of interest.⁶⁹

The Ninth Circuit rejected the landowner's argument that it should interpret the specific requirements for the kinds of analysis in an EIS separately from the statute's overarching environmental goal.⁷⁰ The court explained that "we disagree with our sister circuit that [section] 102 protects purely economic interests or that it can be severed from NEPA's overarching [environmental] purpose."⁷¹ The court also noted that the landowner never even presented a pretense of environmental concern.⁷² Thus, the *Ashley Creek* court reaffirmed the Ninth Circuit's fidelity to the *Port of Astoria*

66. *See id.*

67. *Id.* at 937.

68. The Ninth Circuit stated that: "We have long described the zone of interests that NEPA protects as being environmental." *Id.* at 940. On the constitutional standing issue, the court ruled that the landowner, located some 250 miles from the proposed mining on federal lands, lacked a "geographic nexus" necessary to show a concrete injury in the case, and therefore lacked Article III standing. *Id.* at 938.

69. *See id.* at 940–41 (citing 42 U.S.C. § 4332(2)(C) (1969) (requiring that an EIS consider "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented")).

70. *Id.* at 944–45 ("In contrast to the ESA, under which the substantive goals of an individual provision may have a more specific objective than the overarching goal of the statute and may be analyzed independently, § 102 of NEPA cannot be separated from the statute's overarching purpose of environmental protection because it is designed to further that purpose.").

71. *Id.* at 942.

72. *Id.*

precedent and reiterated its rule that a pecuniary concern is not a sufficient basis to challenge a federal proposal under NEPA.⁷³

D. The Effect of the Ninth Circuit's "Zone of Interests" NEPA Rule

Ashley Creek's affirmation of the Ninth Circuit's three-decade old *Port of Astoria* rule reflects a judicial commitment to NEPA's purpose of environmental protection.⁷⁴ The Supreme Court may or may not share the Ninth Circuit's view of NEPA,⁷⁵ but the Ninth Circuit's position reflects the purpose

73. *Id.* at 945 ("In light of the purpose of § 102(2)(C)—protection of the environment—and the specific statutory requirements for the content of an EIS, we hold that a purely economic injury that is not intertwined with an environmental interest does not fall within § 102's zone of interests.").

74. Courts in the Ninth Circuit continue to follow this rule. *See* *Am. Indep. Mines & Minerals Co. v. U.S. Dep't of Agric.*, 733 F. Supp. 2d 1241, 1251 (D. Idaho 2010) (denying standing to mining companies challenging a Forest Service EIS on its "travel management rule," which required the Service to designate certain roads open for motor vehicles, and prohibited vehicle use on any other roads or off-road, because they had "not linked their pecuniary interest in mineral resource development to the physical environment or to an environmental interest contemplated by NEPA"); *W. Radio Servs. Co. v. U.S. Forest Serv.*, 08-6359-HO, 2010 WL 1169794, at *6 (D. Or. 2010) (telecommunications company and its owner lacked standing to challenge Forest Service's decision to allow BPA to construct a telecommunications facility in the Deschutes National Forest because the plaintiffs' interests did "not appear to fall into either the NFMA or NEPA zones of interest").

75. *See* Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507 (2012) (arguing that the government's "perfect" NEPA record in the Supreme Court is more nuanced and the Court is less consistently hostile to the statute than is generally appreciated; the poor record of plaintiffs is due in large measure to the persuasiveness of the U.S. Solicitor General and the influence of former Chief Justice Rehnquist); Richard J. Lazarus, *The Power of Persuasion Before and Within the Supreme Court: Reflections on NEPA's Zero for Seventeen Record at the High Court*, 2012 U. ILL. L. REV. 231, 236 (2012) ("The basic statistics are striking: in the seventeen NEPA cases the Supreme Court has decided on the merits, the federal government has won every single one. In none of those cases were environmental groups the petitioner, for in all seventeen, the environmentalist plaintiffs had won below and therefore had everything to lose before the Court. And, that is exactly what they did: lose. Amazingly, from 1976 until the Court decided *Winter v. Natural Resources Defense Council, Inc.* in November 2008, environmentalists lost all their cases unanimously, without obtaining a single vote of a single Justice."); David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551, 553 (1990) ("The Supreme Court has never decided a case, or for that matter a single issue in a case, in favor of a NEPA plaintiff."); Jeannette MacMillan, Note, *An International Dispute Reveals Weaknesses in Domestic Environmental Law: NAFTA, NEPA, and the Case of Mexican Trucks* (Department of Transportation v. Public

of the statute as described by Congress: to establish a national policy to “encourage productive and enjoyable harmony between man and his environment.”⁷⁶ Although the statute is primarily procedural in nature, it is clear that Congress intended for federal agencies to use NEPA for environmental preservation and restoration.⁷⁷

Without an emphasis on the environmental purpose of NEPA, the statute could be employed—as it may now be in the Eighth Circuit—by economic interests to obstruct federal proposals that are inconsistent with their profit-seeking motives. Congress had no intention of protecting such interests when it enacted NEPA.⁷⁸ In the Ninth Circuit, this sort of obstructionism has not been possible, which has prevented the nation’s chief generic commitment to the environment from becoming an obstacle available to economic interests.

III. GIVING LEGAL PROTECTION TO THE EXISTING ENVIRONMENT: AN INSUFFICIENT NEPA TRIGGER

The contentious fight in the Pacific Northwest over the listing of the northern spotted owl under the ESA produced considerable litigation.⁷⁹ After the listing, the district court for

Citizen), 32 *ECOLOGY L.Q.* 491, 521 (2005) (“After a few years of generous interpretation by the lower courts, the Supreme Court began deciding against NEPA plaintiffs. Because courts are the major enforcers of NEPA’s environmental mandate, judicial hostility to expansive readings of NEPA has doomed a substantive role for the statute.”); Jason J. Czarnezki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 *STAN. ENVTL. L.J.* 3, 10 (2006) (“the goals of NEPA have had difficulty gaining substantive enforcement by the United States Supreme Court”).

76. 42 U.S.C. 4321 (2006).

77. See *supra* note 27; 115 *CONG. REC.* 40,417 (daily ed. Dec. 20, 1969) (statement of Sen. Jackson) (“The needs and the aspirations of future generations make it our duty to build a sound and operable foundation of national objectives for the management of our resources for our children and their children. The future of succeeding generations in this country is in our hands. It will be shaped by the choices we make. We will not, and they cannot escape the consequences of our choices.”).

78. See 115 *CONG. REC.* 40,925 (daily ed. Dec. 22, 1969) (statement of Rep. Mailliard) (“This legislation stands as a commitment of the Federal Government to the American people that the quality of life in this country in terms of its basic environmental components will be restored and maintained for our own benefit and that of succeeding generations of succeeding generations of Americans.”).

79. For a history of the spotted owl listing, see Michael C. Blumm, *Ancient Forests, Spotted Owls, and Modern Public Land Law*, 18 *B.C. ENVTL. AFF. L. REV.* 605 (1990); Alyson C. Flournoy, *Beyond the “Spotted Owl Problem”: Learning from the Old-Growth Controversy*, 17 *HARV. ENVTL. L. REV.* 261 (1993); Victor M. Sher, *Travels with Strix*:

the Western District of Washington ordered the Fish and Wildlife Service (FWS) to designate critical habitat for the species.⁸⁰ Several counties challenged the failure to apply NEPA procedures to the critical habitat designation in court.

A. NEPA and Preserving the Status Quo

In *Douglas County v. Lujan*, two Oregon counties challenged the procedure used to designate critical habitat for the Northern Spotted Owl, seeking injunctive relief.⁸¹ A previous court decision imposed a short timeline for the designation.⁸² In its proposed habitat designation, FWS decided not to prepare an environmental assessment,⁸³ citing the conclusions of CEQ⁸⁴ and the reasoning of the Sixth Circuit in *Pacific Legal Foundation v. Andrus*.⁸⁵

In *Pacific Legal Foundation*, the Sixth Circuit concluded that the listing of a species under the ESA did not require an EIS because an EIS would advance neither the purposes of the ESA⁸⁶ nor NEPA.⁸⁷ Instead, a listing made without an EIS

The Spotted Owl's Journey Through the Federal Courts, 14 PUB. LAND L. REV. 41 (1993); Brendon Swedlow, *Scientists, Judges, and Spotted Owls: Policymakers in the Pacific Northwest*, 13 DUKE ENVTL. L. & POL'Y F. 187 (2003).

80. *N. Spotted Owl v. Lujan*, 758 F. Supp. 621, 629 (W.D. Wash. 1991).

81. 810 F. Supp. 1470, 1472 (D. Or. 1992). The court considered a challenge to the county's standing as purely economic; it decided that the county's claims were within NEPA's zone of interest as it has "an environmental interest in managing the fish and wildlife within its boundaries." *Id.* at 1476-77.

82. The Western District of Washington had given FWS less than three months to publish a proposed rule. *N. Spotted Owl*, 758 F. Supp. at 629-30.

83. Proposed Determination of Critical Habitat for the Northern Spotted Owl, 56 Fed. Reg. 20,816, 20,824 (May 6, 1991) (to be codified at 50 C.F.R. pt. 17).

84. In announcing the new policy, FWS stated that it had accepted "CEQ's judgment that Section 4 listing actions are exempt from NEPA review 'as a matter of law.'" Notice Regarding Preparation of Environmental Assessments for Listing Actions Under the Endangered Species Act, 48 Fed. Reg. 49,244 (Oct. 25, 1983) (to be codified at 50 C.F.R. pt. 17). The court noted that the CEQ is charged with administering NEPA, and thus CEQ's "interpretation of NEPA is entitled to substantial deference." *Douglas Cnty. v. Lujan*, 810 F. Supp. 1470, 1474 (1992) (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)).

85. 657 F.2d 829 (6th Cir. 1981).

86. The court stated that the purposes of the ESA "are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for conservation, and to achieve the purposes of the treaties and conventions signed with foreign countries to conserve various species." *Id.* at 835.

87. According to the court, "NEPA is primarily a procedural statute to insure that

would further NEPA's purpose to protect the environment from irreparable damage.⁸⁸ Thus, the Sixth Circuit concluded that requiring an EIS under NEPA to make a listing decision under the ESA would be inconsistent with the purposes of both statutes.⁸⁹

In *Douglas County v. Lujan*, the district court rejected the reasoning of *Pacific Legal Foundation*, distinguishing the listing of a species under the ESA from the designation of critical habitat under the ESA. The court concluded that because FWS has more discretion when considering the designation of critical habitat, prior NEPA analysis would improve the agency's ultimate decision and would not conflict with the requirements of the ESA.⁹⁰

FWS had argued that, even without an EIS, designating critical habitat advances the policy goals of NEPA.⁹¹ But Ninth Circuit case law holds that Congress intended NEPA to inform both the government and the public of the likely environmental effects of agency actions.⁹² Therefore, the district court reasoned, even an action maintaining the environmental status quo requires NEPA analysis to

an agency considers the environmental impact. The impact statement is evidence that environmental concerns were considered by the agency." *Id.* at 836.

88. *Id.* at 835–37. The court stated that “[t]he purposes of NEPA are to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote prevention or elimination of damage to the environment and stimulate the health and welfare of man; to enrich the understanding of ecological systems and natural resources; and to establish a Council on Environmental Quality The legislative history also indicates the purpose of NEPA was to provide a mechanism to enhance or improve the environment and prevent further irreparable damage.” *Id.* at 837.

89. The court reasoned that “[t]o require EPA to file an impact statement [for actions taken under the Clean Air Act] would only hinder its efforts at attaining the goal of improving the environment. That same rationale applies to actions of the Secretary of the Interior when he lists species as endangered or threatened in such action, the Secretary is charged solely with protecting the environment.” *Id.*

90. *Douglas Cnty. v. Lujan*, 810 F. Supp. 1470, 1479 (1992). FWS argued that when designating critical habitat, as in a listing decision, the agency lacked discretion to consider many of the factors weighed in a NEPA analysis. In response, the court focused on the ESA's language allowing FWS to consider “economic impact *and any other relevant impact*” when establishing critical habitat. *Id.* (quoting 16 U.S.C. § 1533(b)(2) (2006)).

91. *Id.* at 1481.

92. *Id.* (referring to *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974) (ruling that the EIS on the construction of Teton dam and reservoir contained adequately detailed analysis of the alternatives and cost-benefit considerations, and was properly limited to just the first phase of construction)).

determine and disclose the likely environmental consequences.⁹³ Consequently, the court enjoined the critical habitat designation pending NEPA analysis.⁹⁴

B. Exempting Critical Habitat Designations From NEPA

In *Douglas County v. Babbitt*,⁹⁵ the FWS appealed the injunction granted by the district court,⁹⁶ contending that the county lacked standing, and that the lower court erred by concluding that NEPA applied to critical habitat designations.⁹⁷ Additionally, Headwaters, an environmental intervener, contended that the environment would be fully protected without an EIS.⁹⁸

The Ninth Circuit compared the case to *Merrell v. Thomas*,⁹⁹ which decided that NEPA analysis was not required when the Environmental Protection Agency (EPA) registered pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹⁰⁰ The court concluded that, as in *Merrell*, congressional inaction ratified the FWS's policy that NEPA did not apply to critical habitat designations.¹⁰¹

93. *Id.* at 1481–82. The court noted that “while some cases have indicated that agencies whose mission it is to protect the environment are exempt from NEPA requirements, the Ninth Circuit has applied this rule very narrowly.” *Id.* at 1481 (referring to *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776 (1976) (holding that all agencies must comply with NEPA’s requirements unless there is a clear and unavoidable statutory conflict)).

94. *Id.* at 1485.

95. 48 F.3d 1495 (9th Cir. 1995). The incoming Clinton Administration, with Bruce Babbitt as Secretary of the Interior, continued to defend the critical habitat designation made under the previous administration of George H.W. Bush; thus, the change of party name in the Ninth Circuit.

96. *Id.* at 1497.

97. *Id.* at 1499.

98. *Id.* The interveners claimed that “an EIS is not required because the federal action at issue does not change the natural, physical environment.” According to this argument, the designation of critical habitat was not a “major action significantly affecting the human environment,” and therefore did not implicate NEPA. *Id.* at 1497.

99. 807 F.2d 776 (9th Cir. 1986).

100. *Douglas Cnty. v. Babbitt*, 48 F.3d at 1502. EPA maintained that actions under FIFRA were not subject to NEPA procedures, due to the similarity of procedures. Since Congress did not, in subsequent revisions of FIFRA, require EPA to change policy, the *Merrell* court held that this lack of action indicated that Congress did not intend both statutes to apply to EPA pesticide registrations. *Merrell*, 807 F.2d at 781.

101. *Douglas Cnty.*, 48 F.3d at 1503. Congress amended the ESA after the *Pacific Legal Foundation* decision—and after publication of official notice from the Secretary that NEPA analysis would not be made for critical habitat designations—without

The *Douglas County* Ninth Circuit panel proceeded to discuss the reasoning of the Supreme Court in *Metropolitan Edison Co. v. People Against Nuclear Energy*, in which the Court ruled that NEPA did not require the Nuclear Regulatory Commission to consider the psychological health effects likely to be caused by restarting an undamaged reactor at the site of the Three Mile Island incident.¹⁰² The Supreme Court stated that while the broad language in NEPA's statement of policy refers to "human health and welfare," the specific goal of NEPA is to protect the existing environment, and any resulting benefits to human health are the consequence of that purpose.¹⁰³ Thus, according to the Court, the agency had no duty to consider the psychological impacts of restarting the nuclear reactor because the "risk of an accident is not an effect on the physical environment."¹⁰⁴ According to the decision, only federal actions adversely and directly affecting the existing physical environment trigger NEPA. The court relied on the Supreme Court's reasoning to conclude that "an EIS is unnecessary when the action at issue does not alter the natural, untouched physical environment at all."¹⁰⁵ The Ninth Circuit consequently disagreed with the district court's reasoning that inevitable natural changes would trigger NEPA, holding that actions creating legal protections for an undisturbed environment do not require NEPA analysis.¹⁰⁶

Reversing the lower court, the Ninth Circuit stated that it would not allow NEPA to be used as an "obstructionist tactic"

acting to change the Department of Interior's policy. *Id.* at 1503–04. Additionally, the court determined that the ESA "displaces NEPA's procedural and informational requirements." *Id.* at 1503.

102. 460 U.S. 766 (1983).

103. *Id.* at 773 ("although NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment").

104. *Id.* at 775. The Court added that "[w]e believe that the element of risk lengthens the causal chain beyond the reach of NEPA." *Id.*

105. *Douglas Cnty. v. Babbitt*, 48 F.3d at 1505.

106. The court stated, "[W]hen a federal agency takes an action that prevents human interference with the environment, it need not prepare an EIS." *Id.* at 1506. Returning to the reasoning in *Pacific Legal Foundation* that was rejected by the district court, the Ninth Circuit decided that since designation of critical habitat furthered the purpose of NEPA, requiring an EIS would hinder that purpose. *Id.* Reviewing *Pacific Legal Foundation*, the Ninth Circuit made clear that the Sixth Circuit's reasoning applied to the critical habitat designation for the northern spotted owl. *Id.* at 1507.

to prevent environmental protection.¹⁰⁷ As in the *Port of Astoria* decision,¹⁰⁸ this result has the effect of simultaneously limiting NEPA's scope while strengthening its core mission. By determining that NEPA analysis need not be performed on critical habitat designation, the Ninth Circuit denied challengers a cause of action that could interfere with designation of critical habitat under the ESA.

C. *The Effect of Not Requiring NEPA Analysis for Protecting the Existing Environment*

The Ninth Circuit continues to follow the holding of *Douglas County* that NEPA analysis is not required for critical habitat designation under the ESA.¹⁰⁹ The rule that actions which merely preserve the environmental status quo do not require NEPA analysis also has been applied by courts outside the Ninth Circuit, but not consistently.¹¹⁰ For example, the Tenth Circuit reached the opposite conclusion in a case involving the designation of critical habitat for the spikedace and loach

107. *Id.* at 1508. The court noted that the concern over use of NEPA to obstruct environmental protection was first stated by the Sixth Circuit in *Pacific Legal Foundation*, adding that “[t]his conclusion is as consistent with legal precedent as it is with sound policy.” *Id.*

108. *See supra* notes 36–47 and accompanying text. One peer reviewer noted that court’s result—exempting actions giving legal protection to the existing environment from NEPA analysis—does not necessarily ensure an environmental result. For example, if the Fish and Wildlife Service gave legal protection in the form of critical habitat designation only to a portion of the area necessary for spotted owl survival and recovery, that decision would be shielded from NEPA review.

109. *See Trout Unlimited v. Lohn*, No. CV05-1128-JCC, 2007 WL 1730090, at *13 (W.D. Wash. June 13, 2007) (holding that the promulgation of the National Marine Fisheries Service’s “evolutionary significant unit” policy, concerning how hatchery fish should figure into listing decisions under the ESA, did not require the Service to prepare an EIS because “the Court is persuaded that the Ninth Circuit’s reasoning in *Douglas County* that the ESA procedures have displaced those in NEPA is equally applicable to the present case”).

110. *See American Sand Ass’n v. U.S. Dep’t of Interior*, 268 F. Supp. 2d 1250, 1253 (S.D. Cal. 2003) (stating that, although superseded by a subsequently prepared EIS, the Bureau of Land Management could temporarily close areas to off-highway vehicles without NEPA analysis); *but see Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114–15 (9th Cir. 2002) (holding that by adopting the “roadless rule” for areas of the national forests (discussed *infra* notes 167–83 and accompanying text), the Forest Service would change the environmental status quo, because active forest management had been practiced for decades, thus refusing to extend the logic of *Douglas County*).

minnow in New Mexico.¹¹¹ The court concluded that requiring NEPA analysis only when an action would result in environmental harms would undermine NEPA's purpose, which the court defined as ensuring that public officials make choices informed by full knowledge of an action's environmental consequences.¹¹²

Similarly, the District of Columbia District Court rejected the logic of *Douglas County* in a challenge to the designation of critical habitat for the wintering piping plover in North Carolina.¹¹³ The court dismissed the notion that NEPA analysis need not be prepared for an action that protects the physical environment, reasoning that NEPA concerns the quality of the human environment, which may be affected by placing restrictions on the areas designated as critical habitat.¹¹⁴ By determining that NEPA analysis is unnecessary for critical habitat designations, the Ninth Circuit prevented NEPA from being used by those who would invoke its procedures against the environment.¹¹⁵ When used as a

111. *Catron Cnty. Bd. of Com'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1436 (1996) (disagreeing with the reasoning in *Douglas County*).

112. *Id.* at 1437 (citing 40 C.F.R. § 1500.1(c) (2012)).

113. *Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004).

114. *Id.* at 136 (“[T]he Ninth Circuit does not contemplate how placing restrictions on land use which benefit a species may harm the human environment, may significantly affect it, by preventing or restricting certain activities.”). Recently, another D.C. district court, while not directly addressing the holding of *Douglas County*, rejected an argument that ESA § 4(d) rules allowing ESA “takes” of listed polar bears are exempt from NEPA because they went through notice and comment rulemaking, which cited *Douglas County*. *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 236–37 (D.D.C. 2011). If the D.C. Circuit were to affirm this position and reject the holding of *Douglas County*, the Ninth Circuit precedent could be functionally overruled, as plaintiffs are always able to challenge federal agency NEPA compliance in the D.C. Circuit, a result that would undermine the environmental protection the Ninth Circuit rule provides.

115. One peer reviewer of this article suggested that the result in *Douglas County* was explainable by the fact that the plaintiffs in the case were really economic interests disguised as environmental interests wishing to see more deer and other species favoring logged-over areas. Thus, it is possible to see *Douglas County* as a progeny of *Port of Astoria's* hostility to economic interests using NEPA for non-environmental ends.

Not all commentators believe that designation of critical habitat is an appropriate means for furthering the goals of the ESA. See Robert J. Scarpello, Note, *Statutory Redundancy: Why Congress Should Overhaul the Endangered Species Act to Exclude Critical Habitat Designation*, 30 B.C. ENVTL. AFF. L. REV. 399 (2003) (arguing that critical habitat should be eliminated, as it drains resources and “serves as nothing

mechanism to hinder designations, NEPA consumes federal resources and delays agency actions protecting the environment.

IV. THE “THRESHOLD” FOR AN EIS: THE “SIGNIFICANCE” OF A PROPOSED ACTION

When an agency determines that a proposal is likely to “significantly affect[] the quality of the human environment,” NEPA requires the agency to prepare an EIS that fully analyzes the environmental consequences of its proposal.¹¹⁶ An agency often prepares an environmental assessment (EA) as the first step in NEPA analysis.¹¹⁷ Although an EA can determine that the agency should prepare an EIS, usually it justifies a finding of no significant impact (FONSI),¹¹⁸ which concludes the NEPA analysis on a proposal. Completing an EIS often takes years and requires resources that would otherwise be used elsewhere, so agencies have an incentive to issue a FONSI whenever possible. Environmental plaintiffs frequently challenge FONSI, alleging that a proposal would actually produce significant environmental effects, and therefore requires an EIS. Thus, courts must review whether an agency’s “threshold” decision that a proposed action will not have significant effects constitutes a violation of NEPA.¹¹⁹ The Ninth Circuit’s test for this question—which it has consistently

more than a weapon for environmentalists to block land development”); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-803, REPORT TO CONGRESSIONAL REQUESTORS: FISH AND WILDLIFE SERVICE USES BEST AVAILABLE SCIENCE TO MAKE LISTING DECISIONS, BUT ADDITIONAL GUIDANCE NEEDED FOR CRITICAL HABITAT DESIGNATIONS 32 (2003) (GAO report to Congress claiming that “Litigation now dominates the [critical habitat] program, leading the Assistant Secretary for Fish and Wildlife and Parks in the Department of the Interior to recently declare that the system for designating critical habitat is ‘broken’ because it provides little conservation benefit while consuming significant resources”).

116. 42 U.S.C. § 4332 (2006).

117. 40 C.F.R. § 1508.9 (2012). An EA is not necessary when the agency initially decides to prepare an EIS. *Id.* § 1501.3. The CEQ regulations require neither an EA nor an EIS to be prepared when an agency determines that the action falls under a pre-established categorical exclusion. *Id.* § 1508.4.

118. *Id.* § 1508.9.

119. Plaintiffs must bring NEPA challenges under the APA because NEPA lacks a citizen suit provision. The APA prohibits agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” 5 U.S.C. § 706(2)(A) (2006).

used for nearly forty years—favors plaintiffs by putting the burden on the agency to show that there are no significant effects on the environment. The plaintiff, on the other hand, need only raise substantial questions about the environmental consequences of the proposal in order for a court to require preparation of an EIS.

A. *The Ninth Circuit’s “Substantial Questions” Test*

The origin of the Ninth Circuit’s rule about whether an agency proposal is “significant” lies in *City of Davis v. Coleman*,¹²⁰ where the court ruled that an EIS is required when a plaintiff raises “substantial questions” about the “significant adverse impacts” of a project.¹²¹ The municipality of Davis, California challenged the construction of a freeway interchange planned by the Division of Highways of the California Department of Public Works, and funded in part by the Federal Highway Administration, because the federal agency failed to prepare an EIS.¹²² The district court ruled that the City lacked standing to bring the suit, but the Ninth Circuit reversed and reached the alleged NEPA violation that the district court avoided.¹²³ According to the appeals court, the standard of review for an agency’s decision not to prepare an EIS requires “a plaintiff [to] ‘allege[] facts which, if true, show that the proposed project would materially degrade any aspect of environmental quality.’”¹²⁴ Thus, the reviewing court

120. 521 F.2d 661 (9th Cir. 1975).

121. *Id.* at 673.

122. *Id.* at 666. Additionally, the state agency failed to prepare an environmental impact report (EIR) required by the California Environmental Quality Act of 1970 (CEQA), CAL. PUB. RESOURCES CODE § 21100. *Coleman*, 521 F.2d at 666.

123. *Coleman*, 521 F.2d at 673. The district court ruled that the city had not shown injury in fact, but the Ninth Circuit decided that “[t]he procedural injury implicit in agency failure to prepare an EIS—the creation of a risk that serious environmental impacts will be overlooked—is itself a sufficient ‘injury in fact’ to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have. This is a broad test, but because the nature and scope of environmental consequences are often highly uncertain before study we think it an appropriate test.” *Id.* at 671.

124. *Id.* at 673 (quoting *Envtl. Def. Fund v. Armstrong*, 487 F.2d 814, 817 n.5 (9th Cir. 1973) (upholding district court’s finding that court-ordered supplementation of the Bureau of Reclamation’s EIS for construction of the New Melones Dam across the Stanislaus River in California satisfied NEPA)).

must “determine whether the responsible agency has ‘reasonably concluded’ that the project will have no significant adverse environmental consequences.”¹²⁵ If a lead agency fails to address, or inadequately considers, “substantial questions” regarding a project’s likelihood of causing environmental harms, under the Ninth Circuit’s rule, the agency must prepare an EIS.¹²⁶

In the Davis highway project, the proponents claimed that the consideration of what development, if any, would result from construction of the interchange was “secondary,” and therefore insufficient, to require environmental analysis.¹²⁷ The court rejected that argument, stating that analysis of secondary effects, while difficult to prepare, is necessary because the purpose of an EIS is to analyze and evaluate all of a project’s environmental consequences.¹²⁸ Thus, because the City raised substantial questions regarding the environmental consequences of the project, the agency could not dismiss those questions without the analysis contained in an EIS.¹²⁹

The Ninth Circuit continues to apply the *City of Davis v. Coleman* rule. For example, in *Foundation for North American Wild Sheep v. U.S. Department of Agriculture*,¹³⁰ a coalition of environmentalists and hunters challenged the adequacy of an EA prepared by the United States Department of Agriculture

125. *Id.* at 673 (quoting *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973) (in a review of a decision as to whether the General Services Administration had to prepare an EIS on a building to house the U.S. Army Corps of Engineers, the Fifth Circuit determined that “[s]ince [plaintiff] has raised substantial environmental issues concerning the proposed recommended project here, the court should proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects which would significantly degrade our environmental quality.”)).

126. *Id.* at 673 (“[W]here substantial questions are raised as to whether a project will have significant adverse impacts it is hardly reasonable for an agency to conclude, prior to study, that an EIS is not required.”).

127. *Id.* at 676.

128. *Id.* at 677 (“If impact statements are to be useful, they must address the major environmental problems likely to be created by a project.”).

129. *Id.* at 675–76 (“We think that this is precisely the kind of situation Congress had in mind when it enacted NEPA: substantial questions have been raised about the environmental consequences of federal action, and the responsible agencies should not be allowed to proceed with the proposed action in ignorance of what those consequences will be.”).

130. 681 F.2d 1172 (9th Cir. 1982).

for the issuance of a special use permit, which would have allowed a mining company to repair and use a road running through calving grounds of desert bighorn sheep in a national forest.¹³¹ The agency concluded that no EIS was necessary after considering the effects of the road on the sheep.¹³² The district court upheld the agency's decision, but, the Ninth Circuit reversed, ruling that the agency's EA lacked necessary analysis of the likely effects on the sheep, thus creating substantial questions and requiring preparation of an EIS.¹³³

A similar result occurred in *Idaho Sporting Congress v. Thomas*,¹³⁴ where the Ninth Circuit decided that NEPA required the Forest Service to produce an EIS prior to selling timber in Targhee National Forest.¹³⁵ The court held that environmentalists raised substantial questions about the effect that the timber sales would have on water quality, reversing the district court.¹³⁶ And in *Blue Mountains Biodiversity Project v. Blackwood*,¹³⁷ the Ninth Circuit determined that environmentalists successfully raised substantial questions about the effect of proposed timber salvage sales in Umatilla National Forest.¹³⁸ The court reversed the district court and ruled that an EIS was necessary to evaluate both the individual projects and their cumulative impacts.¹³⁹

131. *Id.* at 1174–76.

132. *Id.* at 1176.

133. *Id.* at 1178–82 (determining that although faced with substantial questions about the project's effects, the Department of Agriculture either "ignored or, at best, shunted [the questions] aside with mere conclusory statements" and that "[c]ertainly substantial questions are raised whether the closure of Road 2N06 for three months will serve to mitigate the potential harm to the sheep. Where such substantial questions are raised, an EIS must be prepared").

134. 137 F.3d 1146 (9th Cir. 1998).

135. *Id.* at 1154 (overruled on other grounds by *The Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008)).

136. *Id.* at 1151 ("In light of the failure to provide adequate data to the public, we conclude that an EIS is necessary to explore the substantial questions in respect to whether and what significant effects the sale may have.").

137. 161 F.3d 1208 (9th Cir. 1998).

138. *Id.* at 1213–14.

139. *Id.* ("The EA's cursory and inconsistent treatment of sedimentation issues, alone, raises substantial questions about the project's effects on the environment and the unknown risks to the area's renowned fish populations. We do not find adequate support for the Forest Service's decision in its argument that the 3,000 page administrative record contains supporting data. The EA contains virtually no references to any material in support of or in opposition to its conclusions. That is where the Forest Service's defense of its position must be found.").

B. Highly Uncertain Effects and the “Significance” Threshold

Sometimes the uncertainty of the effects of a federal proposal can produce environmentally significant effects within the meaning of NEPA. For example, in *Anderson v. Evans*,¹⁴⁰ animal conservationists challenged an EA on an agreement between the National Oceanic and Atmospheric Administration (NOAA) and the Makah Tribal Council to allow the Tribe to hunt grey whales in Washington, arguing that the FONSI issued by NOAA failed to consider the effects of the hunt on the local whale population.¹⁴¹ The district court ruled for NOAA, deciding that the agency satisfied NEPA by taking a “hard look” at the environmental consequences of allowing the hunt.¹⁴²

The conservationists appealed, pointing to several of the factors that the CEQ regulations defined as indicating action “significantly” affecting the human environment, and therefore triggering preparation of an EIS.¹⁴³ One of these factors is “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.”¹⁴⁴ The Ninth Circuit concluded that that “if there are substantial questions about the impact on the number of whales who frequent the Strait of Juan de Fuca and the northern Washington Coast, an EIS must be prepared.”¹⁴⁵ Consequently, the court held that the EA’s analysis failed to adequately consider the effect that whaling would have on the local whale population.¹⁴⁶ Because the conservationists raised substantial questions—which the EA failed to properly analyze—they satisfied the CEQ standard for “significance” in federal actions, and the Ninth Circuit proceeded to conclude

140. 371 F.3d 475 (9th Cir. 2002).

141. *Id.* at 484–86; the conservationists also claimed violation of the Marine Mammal Protection Act (MMPA).

142. *Id.* at 486.

143. *Id.* at 488; the CEQ factors are found at 40 C.F.R. § 1508.27 (2012).

144. 40 C.F.R. § 1508.27(b)(5) (2012).

145. 371 F.3d at 490.

146. *Id.* at 492. The court stressed that despite the extensive analysis in the EA on the effect on the overall grey whale population, “[n]o one, including the government’s retained scientists, has a firm idea what will happen to the local whale population if the Tribe is allowed to hunt and kill whales pursuant to the approved quota and Makah Management Plan.” *Id.* at 490.

that the FONSI issued by NOAA on the proposed whaling did not satisfy NEPA procedures.¹⁴⁷

C. The Effect of the “Substantial Questions” Test: Forcing Agencies to Conduct More Rigorous Environmental Analysis

The Ninth Circuit’s threshold rule—that a plaintiff need only raise substantial questions about the effect of a proposed action to succeed on a claim that an action requires an EIS—favors NEPA plaintiffs and seems firmly established.¹⁴⁸ A number of courts outside the Ninth Circuit have turned to the “substantial questions” test when confronted with challenges to an agency’s decision to issue a FONSI.¹⁴⁹ For example, in

147. *Id.* at 494.

148. *See, e.g.*, *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2005) (substantial question as to whether construction of a dock extension would cause significant environmental degradation required an EIS); *Makua v. Rumsfeld*, 163 F. Supp. 2d 1202, 1222 (D. Haw. 2001) (finding that substantial questions existed about environmental effects of naval training at military reservation); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (environmentalists raised substantial questions about the environmental impacts of timber salvage sales, requiring an EIS); *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988) (substantial questions about the environmental impacts of timber sales required an EIS); *Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agric.*, 681 F.2d 1172, 1179 (9th Cir. 1982) (substantial questions about effects of road construction on protected big horn sheep in a national forest required an EIS); However, not all questions raised by plaintiffs satisfy this standard, *see Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng’rs*, 524 F.3d 938, 957 (9th Cir. 2008) (holding that “concerns about air quality, biological resources, and water quality” were adequately addressed in the EA prepared for a mining project); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) (“Simply because a challenger can cherry pick information and data out of the administrative record to support its position does not mean that a project is highly controversial or highly uncertain.”).

149. *See Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997) (“[A] party challenging the agency’s decision not to prepare an EIS must show only that there is a substantial possibility that the action may have a significant impact on the environment, not that it clearly will have such an impact The Forest Service’s determination that preparation of an EIS was not necessary, based on the record before it, was therefore arbitrary and capricious.” (citing *Found. for N. Am. Wild Sheep*, 681 F.2d at 1177-78; *Save Our Ten Acres*, 472 F.2d at 467)); *Weiss v. Kempthorne*, 683 F. Supp. 2d 549, 565 (W.D. Mich. 2010) (“Plaintiffs indicate that their burden is to raise ‘substantial questions’ as to whether a project ‘may have a significant effect But Plaintiffs fail to meet this standard because their contention that the use of the contaminated mitigation parcels may have significant impacts that were not considered by the agencies is merely unsupported speculation. Such speculation is insufficient to raise a ‘substantial’ question.” (citing *Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 825 (E.D. Mich. 2008) (ruling that

Fund for Animals v. Norton,¹⁵⁰ the District of Columbia District Court ruled that FWS violated NEPA when the agency issued a FONSI while granting the state of Maryland a depredation permit under the Migratory Bird Treaty Act to kill up to 1500 mute swans. A group of animal protection organizations and individuals challenged the permit, and the court found substantial questions regarding the environmental effects of the depredation.¹⁵¹

Once a NEPA plaintiff has raised substantial questions about the potential environmental effects of an action for which an agency issued a FONSI, the burden shifts to that agency to show that there will be no significant impact on the environment.¹⁵² This rule causes more analysis to be produced—either to show that no EIS is required or to produce an EIS—giving both agencies and the public more information about potential environmental effects before decisions are made. The result is that the scenario envisioned by NEPA’s

BLM and the Forest Service impermissibly narrowed the range of alternatives for an EIS on exploratory oil and gas drilling), *aff’d in part, vacated in part*, No. 10-1313, 2012 WL 204494 (6th Cir. Jan. 25, 2012); *Choate v. U.S. Army Corps of Eng’rs*, No. 4:07-CV-01170-WRW, 2008 WL 4833113 (E.D. Ark. Nov. 5, 2008) (“If substantial questions are raised regarding whether the proposed action may have a significant effect upon the human environment, a decision not to prepare an EIS is unreasonable.” Said another way: when the environmental effects of a proposed action are highly uncertain or involve unique or unknown risk, an agency must prepare an EIS.” (emphasis omitted) (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)); *Curry v. U.S. Forest Serv.*, 988 F. Supp. 541, 553 (W.D. Pa. 1997) (“[B]ased on the number of ‘intensity’ factors implicated by the Mortality II [timber harvest] Project, as well as the magnitude of the project, plaintiffs have raised ‘substantial questions’ regarding the issue of whether the Mortality II Project ‘may’ have a significant effect on the human environment . . . Therefore, the failure of the Forest Service to prepare an EIS for the Mortality II Project violated its NEPA obligations, and the decision of the Forest Service to approve the project was arbitrary and capricious.” (citing *Nat’l Audubon Soc’y v. Hoffman*, 917 F. Supp. 280 (D. Vt. 1995) (holding that proposals to extend road and conduct logging operations were “significant”))).

150. 281 F. Supp. 2d 209 (D.D.C. 2003).

151. *Id.* at 234 (“[FWS] failed to identify the precise locations at which mute swans will be killed, the number of birds that will be killed at particular individual sites, or the environmental impacts of those killings on local communities.”).

152. When a plaintiff alleges that a proposed project will significantly affect the human environment, it does not require courts to “determine whether a challenged project will in fact have significant effects. Rather, we are to determine whether the responsible agency has ‘reasonably concluded’ that the project will have no significant adverse environmental consequences.” *City of Davis v. Coleman*, 521 F.2d at 673 (emphasis omitted) (quoting *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973)).

drafters is more likely to occur: given more information, agencies will make better decisions, producing better environmental outcomes.

V. REDUCING THE RANGE OF ALTERNATIVES FOR CONSERVATION ACTIONS

Alternatives analysis is the “heart” of an EIS.¹⁵³ The “purpose and need statement,” a required element of each EIS, determines the required range of alternatives.¹⁵⁴ Courts give agencies wide discretion to define a project’s purpose and need.¹⁵⁵ A narrow statement of purpose and need allows an agency to consider only the alternatives that would accomplish that purpose and need,¹⁵⁶ along with the required “no action

153. See 40 C.F.R. § 1502.14 (2012) (CEQ NEPA regulations) (“[Alternatives analysis] is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.”).

154. “The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13 (2012); see *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (ruling that NEPA analysis of highway realignment project, including the alternatives analysis, was adequate, and explaining that “[t]he stated goal of a project necessarily dictates the range of ‘reasonable’ alternatives and an agency cannot define its objectives in unreasonably narrow terms.” See also *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010) (“The BLM may not circumvent this proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives, yet that was the result of the process here. The BLM adopted Kaiser’s interests as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange.”), *cert. denied*, 131 S. Ct. 1783 (U.S. 2011); Haws, *supra* note 2 (discussing how courts assess the adequacy of a purpose and need statement).

155. *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) (ruling that the purpose and need statement in an EIS on a proposed timber sale in a national forest was not unreasonably narrow; “[t]he preparation of [an EIS] necessarily calls for judgment, and that judgment is the agency’s. But the courts can, and should, require full, fair, bona fide compliance with NEPA” (quoting *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (requiring that NEPA documents be made available prior to public hearings))).

156. *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (holding that an EIS on the Army Corps of Engineers’ decision to approve a permit for construction and operation of a log transfer facility on land owned by native shareholders in Alaska contained adequate alternatives analysis, noting that “[w]hen the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which

alternative.”¹⁵⁷ However, an agency may not define a project’s objectives too narrowly.¹⁵⁸ The Ninth Circuit applies a “rule of reason” to both an EIS’s statement of purpose and its range of alternatives.¹⁵⁹ The Ninth Circuit articulated this standard in

another thing might be achieved”).

157. The CEQ regulations require an EIS to “[i]nclude the alternative of no action.” 40 C.F.R. § 1502.14 (2012).

158. *City of Carmel-By-The-Sea*, 123 F.3d at 1155; *see also* *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 670 (7th Cir. 1997) (holding that the Army Corps of Engineers relied on a too-narrow purpose and need statement by limiting the proposed project to ease water shortages to two water districts to a single facility); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (ruling that the Federal Aviation Administration’s EIS on a decision to approve an airport expansion in Toledo contained adequate alternatives analysis but noting that “[a]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality”).

159. *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) (“We evaluate an agency’s statement of purpose under a reasonableness standard.”), *cert. denied*, 131 S. Ct. 1783 (U.S. 2011); *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (“Judicial review of the range of alternatives considered by an agency is governed by a ‘rule of reason’ that requires an agency to set forth only those alternatives necessary to permit a ‘reasoned choice.’” (citing *Save Lake Wash. v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981) (ruling that supplemental EIS for construction of docking facilities for NOAA vessels in Lake Washington adequately considered “navigational risks,” opposing viewpoints, and the location selected for the docks)); *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973) (declaring that EIS for construction of a new runway at Honolulu airport adequately considered a reasonable range of alternatives). This “rule of reason” standard is also followed in the First Circuit, *Roosevelt Campobello Int’l Park Comm’n. v. Envtl. Prot. Agency*, 684 F.2d 1041, 1047 (1st Cir. 1982) (“[T]he guideline adopted by EPA to limit its study of alternatives appears, in this case, to be consistent with the ‘rule of reason’ by which a court measures federal agency compliance with NEPA’s procedural requirements.”); the Second Circuit, *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975) (“[W]e agree with the district court that the discussion of alternatives in an EIS is governed by a ‘rule of reason.’”); the Fifth Circuit, *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000) (“This Court is to follow the ‘rule of reason’ . . . Agencies must explore and evaluate all reasonable alternatives.”); the Sixth Circuit, *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 346 (6th Cir. 2006) (“[T]he agency may apply a ‘rule of reason’ in this area and discuss only ‘reasonable’ alternatives to the proposed action”); the Eighth Circuit, *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999) (“We review the agency’s choice of which alternatives to discuss and the extent to which the EIS must discuss them under the ‘rule of reason.’”); the Tenth Circuit, *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (holding that alternatives analysis in an EIS on the potential expansion of a ski area in a national forest satisfied the “rule of reason”); *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1031 (10th Cir. 2002) (“[T]he Forest Service did not breach the ‘rule of reason’ by refusing to study in detail alternatives that would have limited the [proposed ski resort’s] structure’s size to between 1,600 square feet and 22,000 square

1982 in *California v. Block*, which ruled that the U.S. Forest Service's EIS on its second roadless area review and evaluation (RARE II) program failed to consider an adequate range of alternatives.¹⁶⁰

In the RARE II EIS the Forest Service analyzed eleven alternatives, three "points of reference" and eight "seriously considered" alternatives, that each envisioned opening at least thirty-seven percent of roadless areas to development.¹⁶¹ The Ninth Circuit ruled that the Forest Service failed to adequately consider a reasonable range of alternatives striking a balance between development and preserving potential wilderness areas because it did not consider any alternative restricting development to a smaller percentage of the roadless area.¹⁶² The court stated that the absence of any alternatives that included development on less than one-third of the RARE areas was both "puzzling" and "troubling."¹⁶³ Accordingly, the Ninth Circuit affirmed the district court's ruling that the Forest Service's alternatives analysis in the RARE II EIS violated NEPA.¹⁶⁴

Twenty years later, roadless area management again provided the Ninth Circuit with an opportunity to address the standard for a reasonable range of alternatives. This time, the

feet or moved the structure off-peak altogether."); the D.C. Circuit, *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011) ("[W]e review both an agency's definition of its objectives and its selection of alternatives under the 'rule of reason.'"); and has support from the Supreme Court's statement that "inherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

160. 690 F.2d at 768.

161. *Id.* at 765. "The Final EIS lists eleven alternatives, of which three—"all Wilderness," "no Wilderness" and "no action"—were included as points of reference rather than as seriously considered alternatives . . . All eight of the alternatives seriously considered by the Forest Service assume that at least thirty-seven percent of the RARE II areas should be developed . . . No justification is given for this fundamental premise or the trade-off it reflects." *Id.* at 767.

162. *Id.* ("Although the RARE II Final EIS poses the question whether development should occur at all, it uncritically assumes that a substantial portion of the RARE II areas should be developed and considers only those alternatives with that end result.").

163. *Id.* at 768.

164. *Id.* at 769 ("[W]e conclude it was unreasonable for the Forest Service to overlook the obvious alternative of allocating more than a third of the RARE II acreage to a Wilderness designation.").

lawsuit concerned the Forest Service's "roadless rule" promulgated late in the Clinton Administration,¹⁶⁵ and the Ninth Circuit relaxed the scope of required alternatives when an agency proposes a conservation action, such as protecting roadless areas of national forests.¹⁶⁶

A. *Requiring Analysis of All Viable Alternatives*

In *Kootenai Tribe of Idaho v. Veneman*,¹⁶⁷ the tribe—joined by timber companies, two counties, recreation groups, and livestock owners—challenged the "roadless rule"¹⁶⁸ proposed by the Forest Service.¹⁶⁹ Several environmental groups intervened as defendants. The tribe alleged that the Forest Service violated NEPA because its EIS did not consider a sufficient range of alternatives.¹⁷⁰ Relying on the Ninth Circuit's rule that an EIS lacking analysis of a "viable" alternative violates NEPA,¹⁷¹ the district court reiterated that NEPA requires a thorough alternatives analysis for any proposed resource use.¹⁷²

165. See generally Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143 (2004); Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RES. J. 687 (2004).

166. *Id.*

167. 142 F. Supp. 2d 1231 (D. Idaho 2001).

168. The roadless rule "generally ban[s] road building subject to limited exceptions including the preservation of 'reserved or outstanding rights' or discretionary Forest Service construction necessary for public health and safety." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1105–06 (9th Cir. 2002) (quoting then 36 C.F.R. § 294.12(b)(1),(3)).

169. *Kootenai Tribe*, 142 F. Supp. 2d at 1235–36.

170. *Id.* at 1243.

171. *Id.* ("[T]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate.") (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) (ruling that the EIS for construction of transmission line across federal property within a city's limits was adequate)).

172. The court first acknowledged that the standard for determining whether the agency failed to consider a viable alternative was unclear. *Id.* ("[T]he practicalities of the requirement of are difficult to define."); then the court emphasized the importance of thorough alternatives analysis. *Id.* ("NEPA requires all agencies of the Federal Government, to the fullest extent possible, to '[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."); and concluded by analyzing the standard for determining if an EIS has satisfied the requirement to consider a reasonable range of alternatives is to consider: "(1) whether

The Forest Service's EIS considered just three alternatives, each of which prohibited all road construction in roadless areas differing in terms of restrictions imposed on timber harvesting.¹⁷³ Because the district court saw no basis in the record for the limited range of alternatives the Forest Service evaluated, it ruled that the EIS's range of alternatives was inadequate.¹⁷⁴ Thus, according to the district court, the Forest Service violated NEPA by failing to consider viable alternatives that would have allowed some level of road construction, while preserving other roadless areas.¹⁷⁵

B. Reducing the Range of Alternatives for Conservation Actions

The Ninth Circuit reversed the district court,¹⁷⁶ ruling that when an agency undertakes an action aimed at producing environmental protection, an EIS's range of alternatives need not be as extensive as would be required for an environmentally destructive project.¹⁷⁷ The court thus reached

the federal agency has sufficiently detailed information to make its decision in light of potential environmental consequences, and (2) whether the federal agency has provided the public with information on the environmental impact of the proposed action and encouraged public participation in the development of that information." *Id.*

173. The EIS also included a "no action alternative," which "was included as a required point of reference rather than a seriously considered alternative." *Id.*

174. *Id.* at 1243–44.

175. The court noted that "an agency need not evaluate alternatives that are inconsistent with policy objectives" but determined that there were available alternatives to consider that would fulfill the rule's stated purpose, which was "to prohibit activities that pose the greatest risk to the social and ecological values of inventoried roadless areas." *Id.* (citing *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996) (upholding the alternatives analysis in an EIS prepared by the Forest Service prior to approving a forest management plan for an area including spotted owl habitat)).

176. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002), *abrogated by* *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (eliminating the Ninth Circuit's "federal defendant rule" that "categorically prohibit[ed] private parties and state and local governments from intervening of right on the merits of claims brought under [NEPA]," and abrogating previous rulings upholding the rule. 630 F. 3d at 1176, 1180–81).

177. "The NEPA alternatives requirement must be interpreted less stringently when the proposed agency action has a primary and central purpose to conserve and protect the natural environment, rather than to harm it." *Kootenai Tribe*, 313 F.3d at 1120; The court added that "[c]ertainly, it was not the original purpose of Congress in NEPA that government agencies in advancing conservation of the environment must consider alternatives less restrictive of developmental interests." *Id.*

a conclusion similar to *Douglas County*: NEPA requires less analysis for conservation actions.¹⁷⁸

The *Kootenai Tribe* court acknowledged that the roadless rule EIS lacked alternatives allowing road building.¹⁷⁹ However, alternatives allowing road construction as a part of a “roadless rule” were entirely contrary to the action’s purpose of protecting the roadless areas.¹⁸⁰ As a result, the Ninth Circuit upheld the Forest Service’s EIS as complying with NEPA because it concluded that the Forest Service’s stated objective of protecting roadless areas in national forests from environmental damage was a reasonable one.¹⁸¹

The court decided that NEPA does not require the Forest Service to analyze environmentally destructive alternatives when planning a conservation action because NEPA’s purpose is not served by delaying environmentally protective actions or requiring lengthy analysis of alternative actions that are inconsistent with the Agency’s conservation goals.¹⁸² Consequently, the district court erred because the Forest Service properly limited the range of alternatives in its EIS to those that would advance the Agency’s protection of the

178. *Douglas Cnty. v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), discussed *supra* notes 96–108 and accompanying text.

179. *Kootenai Tribe*, 313 F.3d at 1120.

180. *Id.* at 1120–21. The Ninth Circuit emphasized the many benefits of the roadless rule, including the fact that “unspoiled forest provides not only sheltering shade for the visitor and sustenance for its diverse wildlife but also pure water and fresh oxygen for humankind.” *Id.* at 1121. The roadless rule EIS stated that the “purpose and need” of the rule was “1) to immediately stop activities that have the greatest likelihood of degrading desirable characteristics of inventoried roadless areas, 2) to ensure that ecological and social characteristics of inventoried roadless and other unroaded areas are identified and considered through local forest planning efforts, and 3) to consider the unique social and economic situation of the Tongass National Forest.” U.S. FOREST SERVICE, ROADLESS AREA CONSERVATION DRAFT ENVIRONMENTAL IMPACT STATEMENT SUMMARY AND PROPOSED RULES 4–5 (May 2000), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5139061.pdf.

181. 313 F.3d at 1122 (“Protecting the roadless areas of our national forests from further degradation can hardly be termed unreasonably narrow.”) (referring to *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (ruling that NEPA analysis of highway realignment project, including the alternatives analysis, was adequate)).

182. *Id.* at 1122–23 (“[I]t would turn NEPA on its head to interpret the statute to require that the Forest Service conduct in-depth analyses of environmentally damaging alternatives that are inconsistent with the Forest Service’s conservation policy objectives.”).

roadless areas.¹⁸³

C. The Effect of Reducing the Range of Alternatives for Conservation Actions

Kootenai Tribe's ruling relaxing alternatives analysis review for conservation actions has yet to receive much attention from other courts.¹⁸⁴ However, the Tenth Circuit recently upheld the roadless rule as complying with NEPA, marking the possible end of the tortuous litigation on that subject.

In 2003, the District of Wyoming ruled that the roadless rule EIS violated NEPA by including inadequate alternatives analysis.¹⁸⁵ The Tenth Circuit reversed, deciding that the district court's decision was moot after the Bush Administration adopted a different roadless rule, known as the "state petitions rule."¹⁸⁶ Then, the Northern District of

183. *Id.* Judge Kleinfeld wrote a partial dissent, opining that by failing to analyze an alternative that did not ban all road construction, the Forest Service failed to take the required "hard look" at the effects of the roadless rule. *Id.* at 1126–31 (Kleinfeld, J., dissenting). He then repeated that "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Id.* at 1129 (quoting *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1994) (ruling that the Forest Service's Flathead National Forest Land and Resource Management Plan and the forest-wide EIS violated the ESA by causing jeopardy for threatened grizzly bears, but holding that the EIS, including the alternatives analysis, satisfied NEPA)). Kleinfeld's conclusions conflicted with the majority's view that NEPA did not require consideration of environmentally harmful alternatives that were beyond the proposed action's purpose and need, as stated in the EIS. *Id.* at 1126–31.

184. *Kootenai Tribe's* ruling has generated two positive citations in the Ninth Circuit. See *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 871 (9th Cir. 2004) (ruling that an EIS on managing flows in the Trinity River included a reasonable range of alternatives); *Pac. Coast Fed'n Of Fishermen's Ass'n v. Locke*, No. C 10–04790 CRB, 2011 WL 3443533, at *22 (N.D. Cal. Aug. 5, 2011) (holding that an EIS on establishing a limited access fishing program in the Pacific coast groundfish fishery included a reasonable range of alternatives). Additionally, the District of Wyoming gave it passing reference when ruling that the roadless rule EIS had inadequate alternatives analysis. *Wyoming v. U.S. Dep't of Agric. (Wyoming I)*, 277 F. Supp. 2d 1197, 1203 (D. Wyo. 2003).

185. 277 F. Supp. 2d at 1226 ("[T]he Forest Service did not give each reasonable alternative substantial treatment in the EIS or take a hard look at the environmental consequences of its actions.").

186. *Wyoming v. U.S. Dep't of Agric. (Wyoming II)*, 414 F.3d 1207, 1212 (10th Cir. 2005). The state petitions rule "eliminated the uniform national protections of roadless areas from road construction and reconstruction and timber harvesting, reverting to the prior regime of forest-by-forest plans, but adding an optional state-by-state petitioning process to alter the level of protection of roadless areas within individual state borders from that afforded by the forest plans. If a state's petition were accepted, rulemaking on management of roadless areas within that state would begin, although

California enjoined the Bush state petitions rule, reinstating the 2001 Clinton roadless rule.¹⁸⁷ The state of Wyoming challenged the reinstated Clinton rule on the same grounds it was attacked in the Ninth Circuit—for failing to consider a reasonable range of alternatives—and the district court enjoined the rule in *Wyoming v. U.S. Department of Agriculture*.¹⁸⁸ But the Tenth Circuit reversed, deciding that the Forest Service permissibly narrowed the range of alternatives in the EIS's purpose and need statement.¹⁸⁹ The court decided that the Forest Service reasonably concluded that road construction and harvesting timber were the activities most harmful to roadless areas, and therefore the agency could limit the range of alternatives considered to restrictions on those activities.¹⁹⁰ Having properly limited the purpose and need of the proposed action, the Tenth Circuit determined that the range of alternatives analyzed by the Forest Service's EIS was reasonable.¹⁹¹

The Tenth Circuit thus agreed with the Ninth Circuit that the range of alternatives was not too narrow, although its rationale for the relaxed range of alternatives was not expressly because the roadless was an environmentally protective action.¹⁹² Thus, it is not entirely clear if the Tenth

individual forest plans would guide forest management starting immediately upon the rule's promulgation until changed in a state by rulemaking. For those states which did not petition, forest plans would continue to govern roadless areas." *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 881 (N.D. Cal. 2006).

187. The Forest Service promulgated the state petitions rule without any NEPA analysis or consultation under the ESA. *Lockyer*, 459 F. Supp. 2d at 893–919. The district court ruled that the Forest Service had violated both Acts, the court then enjoined the state petitions rule and reinstated the roadless rule. *Id.*

188. *Wyoming I*, 570 F. Supp. 2d at 1339–40 (“[T]he Forest Service’s preordained conception of what a roadless area would be, and its schedule for implementing the final rule, caused the Forest Service to drive the Roadless Rule through the administrative process without weighing the pros and cons of reasonable alternatives to the Roadless Rule.”).

189. *Wyoming II*, 661 F.3d at 1250.

190. *Id.* at 1245–46 (“[T]he Forest Service’s decision to limit the alternatives considered . . . was reasonable in light of its conclusion, based on ample evidence presented in the EIS, that [road construction and timber harvest] posed the greatest risk of destroying the characteristics of [roadless areas], which the proposed rule was intended to protect and preserve.”).

191. *Id.* at 1250.

192. *Id.* at 1245–46 (“[A]ny alternative permitting road construction to a greater extent would not further the defined objective of the Roadless Rule and would therefore not be ‘reasonable.’”).

Circuit will approve a reduced range of alternatives in other EISs on conservation actions.

VI. CONCLUSION

Congress passed NEPA intending it to provide significant and unprecedented protection for the environment.¹⁹³ NEPA calls on federal agencies to make special efforts to ensure that “man and nature can exist in productive harmony.”¹⁹⁴ To accomplish this goal, the statute established detailed procedures for agencies to demonstrate detailed consideration of the environmental consequences of their actions and to publicly disclose those effects. The Ninth Circuit has fostered NEPA’s environmental purpose by distinguishing conservation measures from other federal proposals and subjecting actions protecting the environment to a different standard than actions likely to harm the environment. This interpretation is consistent with CEQ’s instruction that NEPA’s purpose is to help officials reach informed decisions that protect the environment.¹⁹⁵

The four rules discussed in this paper concern different points in the NEPA process. The first involves who has standing to bring court challenges; the second pertains to actions that trigger NEPA analysis; the third concerns when an EIS is required; the fourth concerns the sufficiency of alternatives analysis in an EIS when the proposal aims to protect the environment.

The common thread among these rules is the Ninth Circuit’s willingness to put the policy of NEPA to “create and maintain

193. See 115 CONG. REC. 40,416 (daily ed. Dec. 20, 1969) (statement of Sen. Jackson) (“[I]t is my view that [NEPA] is the most important and far-reaching environmental and conservation measure ever passed by the Congress”); 115 CONG. REC. 40,926 (daily ed. Dec. 22, 1969) (statement of Rep. Saylor) (“[T]he importance of this legislation cannot be overstated”); *id.* at 40,925–26 (statement of Rep. Garmatz) (“[T]he ugly and devastating disease of pollution has contaminated every aspect of our environment—air, land, and water. The problem is so vast and interrelated, one segment of the environment cannot be separated from another. The only logical and practical approach is a broad-ranging, coordinated Federal program, as is proposed in this legislation.”).

194. 42 U.S.C. § 4331(a) (2006).

195. 40 C.F.R. § 1500.1(c) (2012) (“The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.”).

conditions under which man and nature can exist in productive harmony” into practice.¹⁹⁶ The Ninth Circuit’s interpretations discussed in this paper all flow from that court’s refusal to lose sight of Congress’s fundamental environmental purpose in enacting NEPA.¹⁹⁷ If the Ninth Circuit’s interpretations were more widely adopted by other circuits, both NEPA’s purpose and its procedures would be better served.

196. 42 U.S.C. § 4331 (2006).

197. See *supra* notes 28–30, 33, 88 and accompanying text.